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PETITION AND SUPPORTING BRIEF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 364

VIRGIL E. BARKMAN,

Petitioner,

versus

JOSEPH W. SANFORD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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DAVID B. ALFORD,
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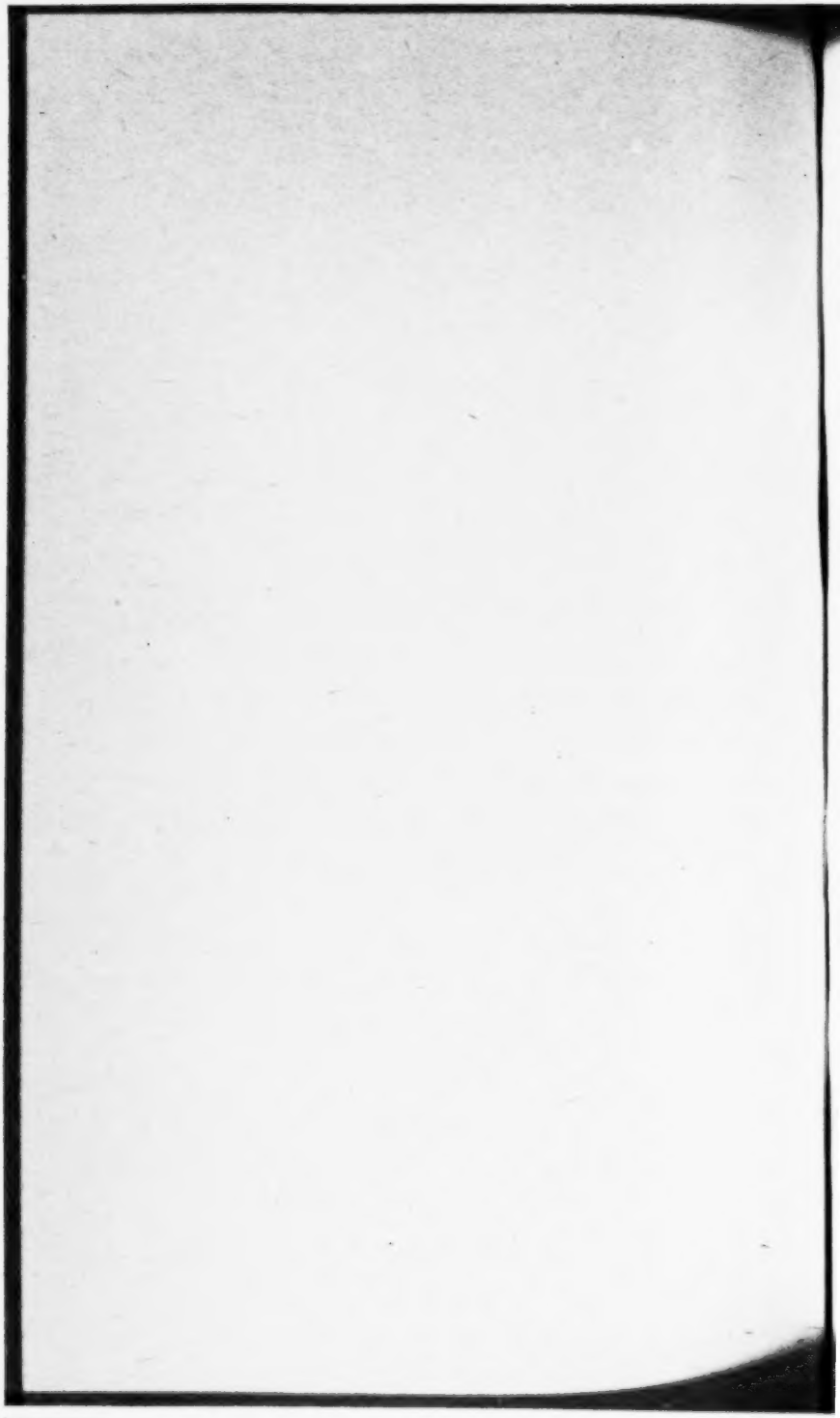
Middleburgh, New York



SUPREME COURT OF THE UNITED STATES

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TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Virgil E. Barkman respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals, Fifth Circuit, to review the decision of said Court rendered the 24th day of June, 1947.

The opinion sought to be reviewed is annexed to the transcript of record filed herewith.

This Court has jurisdiction to review said decision under section 240 of the Judicial Code (28 USC §347).

The statute involved is section 7 of the Federal Rules of

Criminal Procedure permitting defendant to waive indictment for a felony and to consent to trial on an information.

The case has arisen by habeas corpus by petitioner against the respondent in the United States District Court for the Northern District of Georgia on the ground said Rule 7 is unconstitutional as contrary to Amendment 5 of the United States Constitution, and that petitioner's imprisonment is illegal under judgment of conviction in the United States District Court for the Eastern District of Arkansas, Western Division, case number Cr. 14,484, July 8, 1946, after petitioner's waiver of indictment under Rule 7. The writ was discharged by the District Court and the judgment affirmed by the Circuit Court of Appeals.

The questions which are submitted for the Supreme Court's consideration are:

1. Are subdivisions (a) and (b) of Rule 7 of the Federal Rules of Criminal Procedure in violation of Amendment 5 of the Constitution of the United States and unconstitutional?

2. Did the United States District Court for the Eastern District of Arkansas, Western Division, have jurisdiction without an indictment, upon petitioner's waiver thereof, to try and to convict the petitioner?

The reason the said judgment should be reviewed by this Court is that the Circuit Court of Appeals has decided an important question of Federal law, which has not been, but should be, settled by this Court; and said decision is contrary to the settled law of the land.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued by this Court.

DAVID B. ALFORD,
Attorney for Petitioner,
Office & P. O. Address
Middleburgh, New York

STATE OF NEW YORK
COUNTY OF SCHOHARIE SS.:
TOWN OF MIDDLEBURGH

DAVID B. ALFORD being duly sworn deposes and says: I am the attorney for the petitioner herein and reside and have my office at Middleburgh, New York. I have read the foregoing petition and know the contents thereof and the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters I believe it to be true. The reason this verification is made by me and not by the petitioner is that the petitioner is not within the County of Schoharie in which County I have my office.

The sources of my information and the grounds for my belief are conversations with the petitioner and papers and documents in my possession.

DAVID B. ALFORD

Sworn to before me this 10th
day of September, 1947.

LORENE A. PICKETT,
Notary Public — No. 101
Schoharie County.
My comm. expires 3|30|49.

SUPPORTING BRIEF

The decision is contrary to the settled law of the land that without an indictment by a grand jury a court has not jurisdiction to try a person for a felony.

This court said in *Ex Parte Bain*, 121 U.S. 13, that the indictment was "a prerequisite to a prisoner's trial for a crime and without which the Constitution says 'no person shall be held to answer.'"

A similar provision in the New York State Code of Criminal Procedure was held unconstitutional by the Court of Appeals in *People ex rel. Battista v. Christian*, 249 N.Y. 314.

The following states have held waivers of indictment void:

U.S.—*Ex Parte McClusky*, 40 Fed. 71.

Alabama—*Kyser v. State*, 22 Ala. App. 431, 177 So. 157. *Finley v. State*, 61 Ala. 201.

Arizona—*Territory of Arizona v. Blomberg*, 2 Ariz. 204, 11 Pac. 671.

Georgia—*Wright v. State*, 16 Ga. App. 216.

Illinois—*Peo. v. Minto*, 318 Ill. 293, 149 NE 241. *Peo. v. Gray*, 261 Ill. 140.

Mississippi—*Newcomb v. State*, 37 Mississippi 383.

New Jersey—*Richardson v. State Board of Control*, 98 N.J.L. 690, Aff. 99 N.J.L. 516.

New York—*Peo. ex rel. Battista v. Christian*, 249 N.Y. 314.

North Carolina—*State v. Queen*, 91 N.C. 659. *State v. Lochman*, 98 N.C. 763.

Ohio—*Doyle v. State*, 17 Ohio 222.

Pennsylvania—*Com. ex rel. Fagen v. Francies*, 53 Pa. Super. Ct. 278.

Tennessee—*Rice v. State*, 3 Heisk 215.

Texas—*Rainey v. State*, 19 Tex. App. 479.

West Virginia—*Lemons v. State*, 4 W. Va. 755.

Vermont—*State v. Stimpson*, 78 Vt. 124, 62 Atlantic 14.

Although the rule was promulgated by the Supreme Court and we should "tread lightly," as suggested by the decision below, it is respectfully submitted that prior decisions have suggested that neither Congress nor the Courts have the power to alter the constitutional provisions for indictment. This Court stated in *Ex Parte Wilson*, 114 U.S. 426, "the purpose of the amendment was to limit the powers of the legislature as well as of the prosecuting officers of the United States, and no declaration of Congress that a crime is infamous is needed to secure, or competent to defeat, the constitutional safeguard."

In *United States v. Shepard*, 1 Abb. W.S. 431, Federal Cases, No. 16,273, the court said: "The amendment (5th) however, fixed the matter, *beyond the power of Congress or the Courts* (emphasis supplied) to alter the course of

proceeding in bringing forward a charge of crime in the class of cases embraced by the provision."

Far from being a boon to indigent defendants as decried by some of its exponents, Rule 7 is an unconscionable weapon in the hands of a prosecutor against him. Apparently no one has ever presented a defendant's view of the rule to this Court.

The petitioner should have an opportunity to establish the unconstitutionality of the rule in this Court which promulgated it.

Respectfully submitted,

DAVID B. ALFORD,
Attorney for Petitioner,
Office & P. O. Address
Middleburgh, New York

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FILED
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No. 364

In the Supreme Court of the United States

OCTOBER TERM, 1947

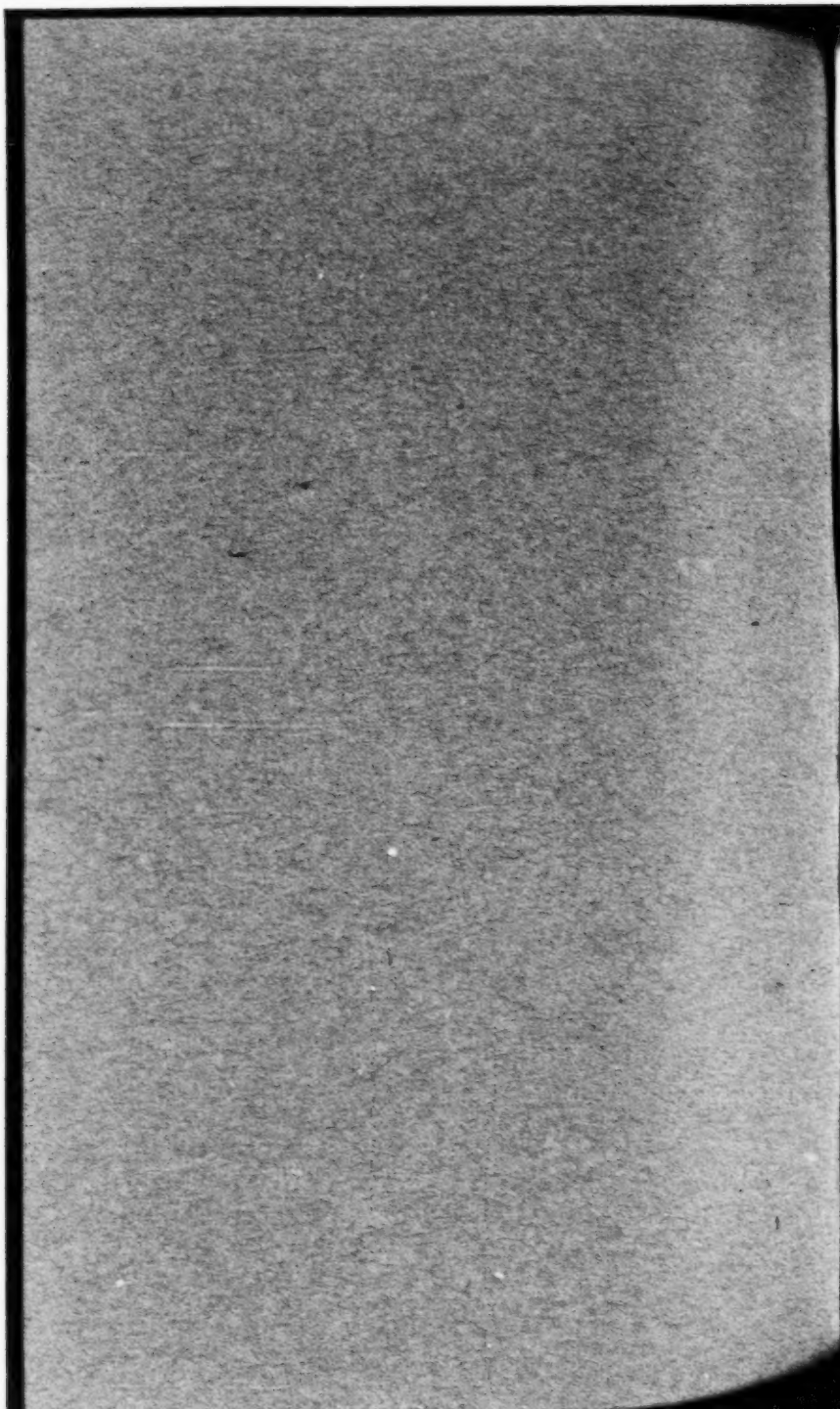
VIRGIL E. BARKMAN, Petitioner

v.

JOSEPH W. SANFORD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, Respondent

On petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

PETITIONER'S MEMORANDUM ON THE QUESTION OF THE CAUSE BECOMING MOOT



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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 364

VIRGIL E. BARKMAN, Petitioner

v.

JOSEPH W. SANFORD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, Respondent

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On petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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PETITIONER'S MEMORANDUM ON THE QUESTION OF THE CAUSE BECOMING MOOT

The petitioner respectfully submits that the release of the petitioner on parole does not render this cause moot. The petitioner is still in the custody of the respondent even though released on parole. The issue in this cause is whether the United States District Court had jurisdiction to try the petitioner, and whether his imprisonment is therefore illegal, and that question is not affected by the parole of the petitioner.

18 U.S.C. 716 provides in part: "he shall be allowed to go on parole outside of said prison * * * and to re-

main, while on parole, in the legal custody and under the control of the warden of such prison from which parolled * * *."

This Court stated in *Anderson v. Corall* 263 U.S. 193, "While on parole the convict is bound to remain *in the legal custody and under the control of the Warden* until the expiration of the term, less allowance, if any, for good conduct. While this is an amelioration of punishment, *it is, in legal effect, imprisonment.*" (Emphasis supplied.)

The Solicitor General's statement that the petitioner "is no longer in the custody of the respondent" is therefore an error of both fact and law.

Even if the parole were considered as a release from the custody of the Warden, that fact would not render the cause moot, for as Mr. Justice Murphy stated in *Walling v. Helmerich & Payne, Inc.* 323 U.S. 37 at page 43, "Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial powers" where there is "an actual controversy and adverse interests" with a "subject matter on which the judgment of the court can operate."

In *Ex. parte Endo* 323 U.S. 283, this Court held that the removal of the petitioner from the jurisdiction of the district court did not render moot the question of the illegality of the detention where the respondent was within the jurisdiction of the court and the petitioner was under the respondent's control or in his custody.

The petitioner respectfully submits that an examination of the cases cited by the respondent discloses the following:

In *Baker v. Hunter* 323 U.S. 740, the question involved was *when* the petitioner was entitled to release on parole, which naturally became academic after he was released. In *Zimmerman v. Walker* 319 U.S. 744, *United States ex rel. Lynn v. Downer* 322 U.S. 756, and *United States ex rel. Innes v. Crystal* 319 U.S. 755, the release of the petitioner from the military authority respondent was absolute and unconditional. In *Torneilo v. Hudspeth* 318 U.S. 792, the question of imprisonment became academic after presidential pardon. *Ex parte Weil* 317 U.S. 597, was an original cause in this Court, being an application for a writ of habeas corpus, and the report of the case does not state the facts but says that the petitioner had been already released from the respondent's custody. In *Weber v. Squier* 315 U.S. 810, the question of whether the suspension of sentence could be revoked became academic when the petitioner was released on parole, as it was immaterial whether he was on parole or on probation.

The petitioner here is still in the legal custody and under the control of the respondent, although he is outside the prison walls. (Cf. *Anderson v. Corall*, supra). If this Court affirms the decision below, such imprisonment will be continued. If this Court reverses the decision below, the writ will be sustained and the petitioner will be released from such imprisonment.

The petitioner respectfully submits that he is still imprisoned for a felony without having been indicted by a grand jury and that such present imprisonment, although he has certain liberties, is still in violation of the Constitution of the United States and that is not a moot question. There is still an actual controversy and adverse interests with a subject matter on which the judgment of the Court can operate.

Respectfully submitted,

DAVID B. ALFORD,
Counsel for Petitioner,
Middleburg, N. Y.

October 17, 1947.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 364

VIRGIL E. BARKMAN, PETITIONER

v.

JOSEPH W. SANFORD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM SUGGESTING THAT THE ABOVE-ENTITLED CAUSE HAS BECOME MOOT

The Solicitor General, on behalf of the above-named respondent, respectfully suggests to the Court that the above-entitled cause has become moot, and that the petition for a writ of certiorari should therefore be denied. The Bureau of Prisons advises that, pursuant to the provisions of the federal parole act (18 U. S. C. 714, *et seq.*), petitioner was paroled on July 18, 1947. Accordingly, since he is no longer in the custody of respondent, he is not restrained of his liberty by

respondent as alleged in the petition for a writ of habeas corpus. *Baker* v. *Hunter,* No. 151, O. T. 1944, certiorari denied, 323 U. S. 740; *Zimmerman* v. *Walker,* 319 U. S. 744; *Tornello* v. *Hudspeth,* 318 U. S. 792; *Ex parte Weil,* 317 U. S. 597; *Weber* v. *Squier,* 315 U. S. 810; cf. *United States ex rel. Lynn* v. *Downer,* 322 U. S. 756; *United States ex rel. Innes* v. *Crystal,* 319 U. S. 755, 783.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

OCTOBER 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947